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IN THE

Supreme Court of the United States

October Term 1967
No. 899

INTERNATIONAL HOD CARRIERS, BUILDING AND COMMON LABORERS UNION OF AMERICA, LOCAL NO. 1082 AND ITS AGENT, GEORGE TARR,

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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NATIONAL LABOR RELATIONS BOARD,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

International Hod Carriers, Building and Common Laborers' Union of America, Local No. 1082, and its Agent, George Tarr, Petition for a Writ of Certiorari to review the Decision of the United States Court of Appeals for the Ninth Circuit entered in this case on September 29, 1967.

Opinions Below.

The Opinion of the Court of Appeals (App. A. *infra,* pp. 1-10 has not yet been officially reported. The Findings of Fact, Conclusions of Law, and Order of the National Labor Relations Board are reported at 150 NLRB 158 (1964).

Jurisdiction.

The decision of the Court of Appeals was rendered on September 29, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Questions Presented.

The Board found that the Union and the Employer bargained to impasse over two issues, one of which was a mandatory subject of bargaining and the other was a non-mandatory although lawful subject of bargaining, following which impasse, the Union struck.

The questions presented are:

1. Whether the Board properly held that it constituted a violation of Section 8(b)(3) of the National Labor Relations Act for a Union to bargain to impasse and strike over a non-mandatory but lawful subject of bargaining.

2. Whether the Board properly held that it constituted a violation of Section 8(b)(3) of the National Labor Relations Act for a Union to bargain to impasse and strike over multiple issues, one of which was a mandatory subject of bargaining and one of which was a non-mandatory although lawful subject of bargaining.

3. Whether the Board properly held that it constituted a violation of Section 8(b)(3) of the National Labor Relations Act, *per se*, for a Union to bargain to impasse over its request for a bond to guarantee payment of wages and fringe benefits.

4. Whether Section 8(d) of the Act constitutes a jurisdictional limitation upon the enforcement activities of the Board or constitutes a restriction on the right to strike.

Statute Involved.

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*), are set forth in Appendix B, *infra*, p. 11.

Statement.

A. The Board's Findings of Fact.

References are to the Transcript which was filed with the Court of Appeals.

The collective bargaining relationship between E. L. Boggs Plastering Company and respondent had its inception in 1959 when Boggs became a member of the Contracting Plasterers' Association of Southern California, Inc., which together with other associations was signatory to an industry wide collective bargaining agreement with various locals of the Laborers Union, including respondent. This agreement, by its terms, expired on May 31, 1962. [Tr. 91.]

On June 4, 1962, the various local unions, including the respondent, and the associations, entered into a new five year collective bargaining agreement. [G. C. Ex. 7].

Prior to the negotiation of the new agreement, however, Boggs had disassociated himself from the association and did not become a party to the agreement by reason of any association membership. Thereafter, an agent of Local 1082 went to a job site in Arcadia in June of 1962 and left a copy of the agreement with Wallace A. Rollman, Boggs' foreman. [Tr. 167.]

Nothing further happened until approximately October of 1962 when Tarr came to Boggs' El Monte job site and told Rollman that he was closing the job down

because Boggs didn't have a contract with the Union. [Tr. 169.] Between the two approaches to Rollman, Boggs had joined another employer's association and its representative, Norman Jones, had requested bargaining with the District Council of Laborers of which Local 1082 is an affiliate. [Tr. 54.] As the contract [G. C. Ex. 7] will indicate, the District Council is not a party to such agreement.

The first meeting was in July of 1962. [Tr. 55.] At that meeting Jones was handed a copy of a contract entitled "Plaster Tenders Agreement" and consisting of some 22 pages. [G. C. Ex. 7, Tr. 57.]

Following this meeting of July 30, 1962, another meeting was held on approximately August 15 or 16, 1962. [Tr. 58.] At the second meeting, Jones submitted counterproposals including, among other things, deletion of the subcontract clause, a reduction of the liability of the contractor for payment of fringe benefits, a modification of the transfer clause, a reduction in the effectiveness of the ratio of plaster tenders clause, as well as a bond provision.

The parties met again on October 26, 1962. Jones represented Boggs and Lionel Richman, attorney for the respondent, represented the unions. [Tr. 68.] At the October 26 meeting the parties discussed the subject of the bond and the proposed waiver of responsibility of the general contractor for any delinquencies in the payment of fringe benefits. [Tr. 178-179.] Also discussed was Jones' demand for the waiver of the subcontract clause and Richman's request for additional compensation for the employees in lieu of the union's waiver of the subcontract clause. [Tr. 179.] During the course of the meeting, Richman stated that

it was his position that if the bond related to wages, hours or conditions of employment, it was a proper subject for bargaining. The union was willing to modify the agreement as far as the form of the bond was concerned and the manner of the posting of bond but the union was not willing to drop the entire subject of the bond as a matter for bargaining. [Tr. 178-179.]

The following meeting was set for November 7 at 2 P.M. All of the union representatives were present and waited for Jones to arrive. At approximately 3 P.M. Jones telephoned from the airport and asked if the representatives would wait for him. He was told that the airport was about an hour's drive from the office and that at least half of the negotiators had left. A further meeting was set up for the latter part of November, 1962, at either 1:30 or 2:00 o'clock [Tr. 180.] At approximately 1:30 Jones' office advised Richman that Jones would not be present at the meeting. Richman telephoned Jones and spoke to Jones' secretary who stated that Jones was out and would be back in 20 minutes. He requested that Jones telephone him when he came in but no telephone call was received. Thereafter, the respondents filed charges against Boggs and Jones alleging refusal to bargain. [Tr. 181.]

Following the filing of these charges, Jones agreed to another meeting and this was set for December 28, 1962. This meeting likewise ended with no agreement. [Tr. 182.]

On January 3, 1963, respondent picketed the job site with a sign reading:

> "Elmer Boggs Unfair. No signed agreement. Local 1082."

On January 4, 1963, Tarr visited the job site and spoke to Elmer Boggs. [Tr. 106.] Boggs asked to call Norman Jones and stated he would like to wait until Jones got there. [Tr. 107.] The parties waited until 10:15 and Jones still had not arrived. Boggs said:

> "I will sign the agreement. It looks like Mr. Jones is not going to show up. It looks like we are not going to get together on negotiations, so I will sign the agreement." [Tr. 110.]

B. The Board's Decision and Order.

The complaint issued against the respondents charged, among other things, that respondents had bargained to impasse with the employer over two issues, the incorporation in the agreement of a subcontract clause, and the incorporation in the agreement of a clause requiring a bond to guarantee payment to employees of wages and earned fringe benefits. Following impasse, the union struck.

The Trial Examiner found, among other violations, that the union had engaged in unfair labor practices within the meaning of Section 8(b)(1)(B), 8(b)(3), 8(b)(4)(i)(ii)(A) and (B) of the Act by striking after impasse for the subcontract clause and the bond clause.

The Board overruled all the findings of unfair labor practices except one of the two charges of violation of Section 8(b)(3) as it pertained to the insistence upon the inclusion of a bond clause, but dismissed the charge as it pertained to the subcontracting clause. As to the latter, the Board found that the union had insisted upon the subcontract clause to the point of im-

passe and struck, but held that such action was lawful in the construction industry under Section 8(e) of the Act.

The decree of the Court of Appeals requires the Union to cease and desist from demanding that Boggs comply with the bond provision of the contract and affirmatively ordered Local 1082 to return to the employer the certified check for $1,000 which he posted as a bond, or, if the check had been cashed, to refund $1,000 to the employer plus 6% interest from the date of cashing, and to post an appropriate notice.

C. The Decision of the Court of Appeals.

The Court of Appeals, by a divided court, enforced the Board's order. The majority, in a brief *per curiam* order, relied upon the Board's expertise for the conclusion that a performance bond is *per se* a nonmandatory subject of bargaining and a strike for such an objective is a violation of the Act.

In an extensive and well reasoned opinion, Circuit Judge Ely dissented. In his dissent, he considered all of the cases cited by the majority and showed that, in each case, the issue presented was one concerning a demand for security for persons other than employees or for purposes other than the protection of payment of wages and fringe benefits. Judge Ely would have denied enforcement.

REASONS FOR GRANTING THE WRIT.

I. The Board Exceeded Its Jurisdiction in Determining That It Constituted a Violation of Section 8(b)(3) of the Act for a Union to Strike Over a Non-Mandatory, Although Lawful, Subject of Bargaining.

The Board makes the basic contention that the language of Section 8(d) of the Act in some manner authorizes it under Section 8(b)(3) of the Act to outlaw otherwise lawful economic activity if the goal that economic activity does not constitute a mandatory subject of collective bargaining. Respondent contends that in taking such a position, the Board misinterprets Section 8(d) of the Act. 8(d) was added to the Act in 1947 not to authorize the Board to censor the conduct of others but rather as a restriction upon the conduct of the Board itself. The amendment was designed as a shield from Board over-reaching rather than as a sword for Board wielding.

The legislative history of Section 8(d) of the Act makes it clear that it was adopted as a restraint upon the Board in applying Sections 8(a)(5) and 8(b)(3), rather than restraining the parties in collective bargaining.

> "In 1947, the fear was expressed in Congress that the Board 'has gone very far, in the guise of determining whether or not employers had bargained in good faith, in setting itself up as the judge of what concessions an employer must make and of the proposals and counterproposals that he may or may not make' (HR Rep. No. 245, 80th Cong., 1st Sess. 19 (1947).) Accordingly, the Hartley Bill, passed by the House, eliminated the

> good faith test and expressly provided that the duty to bargain collectively did not require submission of counter proposals. As amended in the Senate and passed as the Taft-Hartley Act, the good faith test of bargaining was retained and written into 8(d) of the National Labor Relations Act."
>
> *N.L.R.B. v. American National Insurance Company,* 343 U.S. 395, 404, 96 L. Ed. 1027, 1037.

The Court then emphasized that "Congress should not pass upon the desirability of the substantive terms of labor agreements." (Pp. 407, 408.)

The brief opinion of the narrowly divided Court in *N.L.R.B. v. Wooster Division of Borg-Warner Corp.,* 356 U.S. 342, 2 L. Ed. 2d 823 is not inconsistent with this position. The dissent of Mr. Justice Harlan is peculiarly appropriate to the instant case. He noted:

> "The legislative history behind the Wagner and Taft-Hartley Acts persuasively indicates that the Board was never intended to have power to prevent good faith bargaining as to any subject not violative of the provisions or policies of those Acts." (p. 354, 2 L. Ed. 2d 831.)

Citation by the Board of *Internal Longshoremen's Association v. N.L.R.B.,* 277 F. 2d 681, is of small comfort to the Board, since the issue before the Circuit was not the mandatory or non-mandatory nature of the demand by the Union, but its absolute illegality. In facing the specific issue before the Court, Chief Judge Prettyman observed:

> "As a matter of law the Union cannot resort to economic pressure, including strike action, to

force the Employer to agree to deal with representatives of a unit different from the unit certified by the Board."

The same distinction was made by this Court in describing situations where the non-mandatory subject was also an illegal one. (*Meat Cutters Union v. Jewel Tea Co.*, 381 U.S. 676, 689, 14 L. Ed. 2d 640, 649; *United Mine Workers v. Pennington*, 381 U.S. 657, 664, 14 L. Ed. 2d 626, 633).

The argument for the Board's position rests on the assumption that Section 8(d) expresses a Congressional judgment delimiting the sphere in which parties may use economic power to compel agreement. There is no basis for this assumption in the statute or legislative history and, accordingly, non-mandatory subjects should be deemed fully bargainable if good faith is present. The latter is the view of numerous knowledgeable writers in the field.*

Respondent's position is further strengthened by an examination of those portions of the Act dealing with the right to strike. Section 13 of the Act provides:

> "Nothing is this Act, except as specifically provided for herein, shall be construe so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitation or qualifications on that right." (61 Stat. 151, 29 U.S.C. 163).

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*Feinsinger, *The National Labor Relations Act and Collective Bargaining*, 57 Mich. L. Rev. 807, 826-830; Fleming, *The Obligation to Bargain in Good Faith*, 47 Va. L. Rev. 988, 1005-1006, 1013; Wollett, *The Borg-Warner Case and the Role of the N.L.R.B. in the Bargaining Process*, 12 N.Y.U. Ann Conf on Labor, 39, 42; Duvin, *The Duty to Bargain: Law in Search of a Policy*, 64 Colum. L. Rev. 248, 271-273.

The application of Section 13 was most recently restated on April 17, 1967, by this Court.

> "Finally, important parts of the historic accommodation by Congress of the powers of labor and management are Sections 7 and 13 of the National Labor Relations Act, passed as part of the Wagner Act in 1935 and amended in 1947. The former section assures to labor 'the right . . . to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for 'the purpose of collective bargaining or other mutual aid or protection . . .' Section 13 preserves the right to strike, of which the boycott is a form, except as specifically provided in the Act. In the absence of clear indicia of congressional intent to the contrary, these provisions caution against reading statutory prohibitions as embracing employee activities to pressure their own employers into improving the employees' wages, hours, and working conditions. See *Labor Board v. Drivers Union,* 362 U.S. 274, 4 L. ed 2d 710, 80 S. Ct. 706; *Labor Board v. International Rice Milling Co.,* supra, 341 U. S. at 672-673, 95 L. ed at 1282, 1283; *Labor Board v. Denver Bldg. Trades Council,* supra, 341 U. S. at 687, 95 L. ed. at 1294; *Mastro Plastics v. Labor Board,* supra, 350 U. S. at 284, 287, 100 L. ed at 320, 322."
>
> *Woodwork Manufacturers Assn. v. N.L.R.B.,* .... U.S. ...., 18 L. Ed. 2d 357, 377.

In an earlier discussion of the effect of Section 13, Mr. Justice Brennan noted:

> "Therefore, since the Board's order in this case against peaceful picketing would obviously 'impede'

the right to strike, it can only be sustained if such power is 'specifically provided for' in 8(b)(1)(A), as added by the Taft-Hartley Act. To be sure, Section 13 does not require that the authority for the Board action be spelled out in so many words. Rather, since the Board does not contend that 8(b)(1)(A) embodies one of the 'limitations or qualifications on the right to strike, Section 13 declares a 'rule of construction which cautions against an expansive reading of that section which would adversely affect the right to strike, unless the congressional purpose to give it that meaning persuasively appears either from the structure or history of the statute.' "

N.L.R.B. v. Drivers Local Union, 362 U.S. 274, 282, 4 L. Ed. 2d 710, 717.

At the same term of Court, the Board had already been rebuffed in its contention (here also made) that it could regulate a union's right to engage in lawful economic action by invoking 8(b)(3) and 8(d). The Court quoted Professor and former Solicitor General Archibald Cox who had written:

"Collective bargaining is curiously ambivalent even today. In one aspect collective bargaining is a brute contest of economic power somewhat masked by polite manners and columinous statistics."

Thereafter, the Court went on to say:

"For similar reasons, we think the Board's approach involves an intrusion into the substantive aspects of the bargaining process—again, unless

there is some specific warrant for its condemnation of the precise tactics involved here."

N.L.R.B. v. Insurance Agents' International, 361 U.S. 477, 489, 490; 4 L. Ed. 2d 454, 464.

The Court went on to make the very point that respondents make here—even though the strike might not have been protected activity under section 8(a)(1), that does not convert it into a violation of section 8(b)(3).

"But surely that a union activity is not protected against disciplinary action does not mean that it constitutes a refusal to bargain in good faith. The reason why the ordinary economic strike is not evidence of a failure to bargain in good faith is not that it constitutes a protected activity but that, as we have developed, there is simply no inconsistency between the application of economic pressure and good faith collective bargaining. The Board suggests that since (on the assumption we make) the union members' activites here were unprotected, and they could have been discharged, the activities should also be deemed unfair labor practices, since thus the remedy of a cease-and-desist order, milder than mass discharges of personnel and less disruptive of commerce, would be available. The argument is not persuasive. There is little logic in assuming that because Congress was willing to allow employers to use self-help against union tactics, if they were willing to face the economic consequences of its use, it also impliedly declared these tactics unlawful as a matter of federal law. Our problem remains that of construing 8(b)(3)'s terms, and we do not see how the availability of self-help to the employer has anything to do with the matter." (p. 495.)

In footnote No. 25 at page 496, the Court approvingly quoted a pithy comment from Professor Cox:

> "To say 'there ought to be a law against it' does not demonstrate the propriety of the NLRB's imposing the prohibition."

This tacit reprimand moved out of the footnote state and into the opinion level in *American Shipbuilding Company v. N.L.R.B.*, 380 U.S. 300, 316, 13 L. Ed. 2d 855, 866, when the Court, in the lock-out case, said:

> "However, we think that the Board construes its functions too expansively when it claims general authority to define national labor policy by balancing the competing interests of labor and management."

II. The Board Exceeded Its Jurisdiction in Holding Unlawful a Strike After Impasse Over Mandatory and Non-Mandatory but Lawful Objectives.

The Board and the majority in the Court of Appeals cited *Carpenters District Council of Detroit (Excello Dry Wall Co.)*, 145 N.L.R.B. 663, enf'd 58 L.R.R.M. 2065 (C.A.D.C.) as authority for the proposition that contitioning the execution of a collective bargaining agreement upon the inclusion of a non-mandatory subject of bargaining constitutes a refusal to bargain in good faith. This case is particularity apropos for two points raised by respondent.

Beore a violation of 8(b)(3) could be found, where it is claimed that a non-mandatory subject of bargain-

ing is present, under the Board's own theory, an impasse predicated upon that specific ground must be found.

> "The Trial Examiner concluded that it was not a violation of Section 8(b)(3) for Respondents to insist, as a condition to entering into a collective bargaining agreement, with the Charging Party, Excello Dry Wall Co., that the latter establish a fund of $2,500 to be deposited in a trust or 'escrow' account, as security for the payment of wages to employees of Excello and of contributions to benefit funds on their behalf. We do not agree.
>
> "Since 1940, the Board had consistently and repeatedly held, without qualification and with court approval, that it is an unfair labor practice for either an employer or a union to insist that the other party post a performance bond or its equivalent *as a condition precedent* to entering into a collective bargaining agreement." (Emphasis added.) *Carpenters District Council of Detroit,* 145 N.L.R.B. 663.

The record here fails to support the Board's contention that the respondent and Boggs bargained to impasse over a non-mandatory subject. To the contrary, the Board's own decision, in reversing the Trial Examiner, recognized that the union had also demanded and bargained to impasse for a subcontract clause lawful under the construction industry proviso to Section 8(e) of the Act.

The Court of Appeals majority failed to meet this problem entirely. The dissent found no need to reach it since Judge Ely would have denied enforcement in any event.

This basic important issue remains unresolved. When the union struck to get the subcontract clause and the bond, did the lawful strike under *Woodwork Manufacturers Assn. v. N.L.R.B., supra,* become unlawful?

The Trial Examiner, at page 7 of his Intermediate Report, sets forth at length a letter sent by the attorney for the union to Jones in which the question of additional compensation in lieu of the subcontract clause was raised.

A review of the entire record will indicate that the union displayed incredible patience in delaying some seven months after the expiration of the prior collective bargaining agreement before taking economic action to procure a new agreement. Contrary to the Board, the evidence indicates bargaining to impasse over a multitude of subjects, including at least one specifically found by the Board in its Decision and Order to be lawful and mandatory.

The position which the Board takes in this proceeding is anomalous, to say the least. They would have this Honorable Court say that if a union submitted to an employer a request for increased wages, increased fringe benefits, holiday pay, overtime pay, paid vacations, and premium pay, and in addition added a request for a bond, they would not be permitted to strike as long as any one of their demands was deemed to be a non-mandatory subject of collective bargaining. This position places a premium on "hard bargaining" and is certainly not designed to be conducive to constructive labor relations. The one factor which is present in each

case cited by the Board is the insistence upon a non-mandatory subject as a condition precedent to the execution of the agreement. It is the impasse on the non-mandatory subject which gave rise in all of the other cases to the charge; not the mere existence within a multitude of proposals of a single non-mandatory proposal.

The Court must recognize that it is an industrial fact of life that modern collective bargaining involves a weighing of values in each case. A party will yield on one proposal to enhance its position in obtaining another. An economic factor may be surrended to obtain another benefit.

Now, when extended negotiation has brought the parties to deadlock over a number of proposals submitted by a party, one of which is lawful but non-mandatory, what would the Board have the parties do? Must the proponent withdraw the non-mandatory proposal before striking? And if he does, may he then change his position on other mandatory proposals to compensate for the non-mandatory proposal now withdrawn? If he did, the Board would pounce upon him like a hawk, contending that this last minute change in position violates Section 8(b)(3). The effect upon collective bargaining would be chaotic, for it would require a party to hold in reserve a costly, mandatory proposal to fill in for a non-mandatory proposal to be withdrawn. It would effectively handicap the requirement of "good faith" in bargaining enjoined by Section 8(d) of the Act.

III. The Board Improperly Found the Request for the Bond Was a Non-Mandatory Subject for Collective Bargaining.

As respondent has noted, *supra,* the decision of the National Labor Relations Board in *Carpenters District Council of Detroit (Excello Dry Wall Co.), supra,* is of significant importance to a determination of this cause.

It was not a unanimous decision. On the contrary, it was supported by a bare majority of the Board. The dissenters vigorously denounced the total exclusion of a performance bond as a mandatory subject of bargaining.

> "In evaluating this situation the majority, in our view, accords too much weight to a label. Thus, our colleagues are, in effect, holding that wherever the form of a demand may be construed as in the nature of a performance bond, that demand is necessary outside the area of a mandatory subject of collective bargaining and insistence upon such demand is per se an unlawful refusal to bargain."

This was precisely the pitfall which the Supreme Court warned against in *American National Insurance,* where, after noting that:

> "'. . . at least some of the matters covered by the management functions clause proposed by respondent are conditions of employment which are appropriate subjects of collective bargaining under Sections 8(a)(5), 8(d), and 9(a) of the Act . . .' the Court rejected the Board's per se holding with respect to the management functions clause saying:

> " 'The duty to bargain collectively is to be enforced by application of the good faith bargaining standard of Section 8(d) to the facts of each case rather than by prohibiting all employers in every industry from bargaining for management functions clauses altogether.'
>
> * * * * *
>
> "It is our view that the Supreme Court decisions require utilization of a case by case approach in determining the 'mandatory' status of specific bargaining proposals, rather than a per se approach. We believe that application of a Procrustean standard as to what constitutes a mandatory subject renders a serious diservice to the collective bargaining process. We are mindful of the fact that the field of labor relations is not static but is in a constant state of flux and nowhere is this more clearly manifested than at the bargaining table where the content and form of subjects are constantly evolving. This requires an alertness to new variations which are in reality 'emoluments of value or other benefits accruing to employees out of relationship with the employer.' "
>
> *American National Insurance Co.*, 343 U.S. 395, 408.

Those judicial decisions which support the *per se* position of the bare majority of the Board pre-date 1966. Those decisions presume that a union exists solely for the purpose of negotiating collective bargaining agreements.

The scope of a union's obligation to its members is also the measure of its authority since it is axiomatic

that the obligation to perform an act carries with it the implied authority to do those things reasonably necessary to discharge the obligation. While the Circuits generally have supported the Board's position with regard to the posting of bonds, these decisions pre-date *International Union v. Hoosier Cardinal Corp.*, ... U.S. ...., 16 L. Ed. 2d 192 (decided Jan. 27, 1966). In upholding a union's right to sue on behalf of its members, the Court said, at pages 196 and 197:

> "And indeed, the union's standing to vindicate employee rights under 301 implements no more than the established doctrine that the union's role in the collective bargaining process does not end with the making of the contract."

The union's obligation to its members is the protection of the gains which the members win by reason of their collective action. It is a hollow gain for an employee to receive, on paper, an increase in pay, but find that his pay is not collectible.

For the employee, "bread and butter" issues are at the heart of his "wages, hours and conditions of employment."

This Court found, as mandatory subjects of bargaining, subcontracting of work and abolition of jobs.

> "In this era of automation and onrushing technological change, no problems in the domestic economy are of greater concern than those involving job security and employment stability. Because

> of the potentially cruel impact upon the lives and fortunes of the working men and women of the Nation, these problems have understandably engaged the solicitous attention of government, of responsible private business, and particularly of organized labor."

Fibreboard Paper Prods. Corp. v. Labor Board, 379 U.S. 203, 225, 13 L. Ed. 2d 233, 247, 85 S. Ct. 398, 6 A.L.R. 3d 1130 (concurring opinion of Stewart, J.) cited with approval in *Woodwork Manufacturers Assn. v. N.L.R.B.,*....., U.S. ....., 18 L. Ed. 2d 357, 375.

There is little difference between saving a job and saving a pay check. Both are essential to the employee. This is especially true in an industry as volatile as the construction industry.

Rather than applying a *per se* rule, the Board should consider this Court's rationale in *United Mine Workers v. Pennington, supra,* wherein this Court said that the ability of the employer to pay was a factor to be considered in determining the lawfulness of collective bargaining objectives under the Sherman Act.

If the bond sought is reasonably within the employer's ability to furnish and reasonably necessary to ensure payment of wages, it becomes as much a mandatory subject as a guaranteed minimum wage, a guaranteed annual wage, or any other guarantee of wage benefit.

Conclusion.

The decision below takes from unions the right to strike without any Congressional sanction for the deprivation. It takes the handcuffs fashioned by Congress to restrain the Board and clamps them upon innocent parties. In a word, it makes of the Board a super-policeman over the field of labor relations, a position which Congress clearly indicated in Section 8(d) that it should not hold.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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